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INSURANCE—RECENT CONSTRUCTIONS OF CONDITIONS IN POLICIES (VOL. 169 N. E. REP.)—In the interpretation of contracts of insurance it is almost impossible, in any case, to apply abstract rules of construction with any degree of certainty. While general principles have been developed, and are enunciated in almost every decision of the courts upon the subject,

their application has been so varied and elastic that a reference to decisions upon particular situations of fact is perhaps the only source of definite authority. With this in view, the purpose of this note is to furnish some recent material from the Indiana courts in this field.

The Appellate Court of Indiana has touched upon the legal effects of specific clauses in insurance contracts in four recent cases.

I. In *Fidelity Health & Accident Co. v. Holbrook*, — App. —, 169 N. E. 57, the policy contained the following stipulation: (This policy) "Contains the entire contract of insurance except as it may be modified by the company's classification of risks and premium rates. In the event that the insured is injured . . . after having changed his occupation to one classified as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified . . . in which event the company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate limit fixed by the company for such more hazardous occupation."

The insured, an employee of an electric power company, was placed in "Class A," as: "Chief Operator, office and superintending only," at a premium of \$40.00 annually. The occupation of electric *lineman* was considered a more hazardous occupation and placed in "Class X," at a higher premium. While engaged, in company with a lineman, in looking for the source of a line interruption, insured went up into a switch tower and examined certain fuses there. He received an electric shock which caused his instant death. There was testimony that this was an emergency situation, and that the duty of assisting in line examinations in such cases would, in the customary usage of the business, have fallen upon the insured.

The court held that the exemption as to "any act . . . pertaining to any occupation so classified as more hazardous" meant such an act "in no way pertaining to his own occupation;" that insured could recover here as the extra-hazardous act did pertain to his own occupation and duties. In disapproving of Instruction No. 7 given below, the court drew a clear line between occasional emergency extra-hazardous acts which are a part of insured's duties, and such acts which are not.

The decision is presented here to show one of the most recent constructions of conditions restricting the insurer's liability. We do not discuss its merits, which are treated elsewhere in this issue.

II. In *Inter-Southern Life Ins. Co. of Louisville, Ky., v. Bowyer*, — App. —, 169 N. E. 65, the policy insured Bowyer against "death or disability resulting . . . from bodily injuries effected solely through accidental means and sustained by the insured . . . by the wrecking or disablement of any automobile . . . in which the insured is riding or driving or by being accidentally thrown from such wrecked or disabled automobile or vehicle."

The insured, a postal employee, was riding seated upon the tail-gate of a parcel post delivery truck. The chain which supported this tail-gate broke, throwing insured upon the pavement, and so injuring him that he died the same day. The company, conceding that the death was accidental, denied that it was covered by the terms stated above.

The court held that the word "disabled," as used, was to be distinguished from the word "wrecked." That "disabled" did not mean that the vehicle must have been rendered incapable of effective action but, construing it most favorably to the insured, it *could* mean "impaired." Reasoning from this distinction, the court said that deceased was thrown from a "disabled" vehicle in the sense of "impaired," and so could recover under the policy.

The case presents a rather unique philological inquiry, and perhaps indicates the weight of the doctrine of favorable construction to insured of ambiguous clauses, in the eyes of the Appellate Court. The court cites no authorities. It relies upon two definitions of "disabled" given by the Standard Dictionary: "to render incapable of proper action" and "to impair"—choosing the latter.

Webster's New International Dictionary, in defining the word "disable" does not give the meaning "to impair," although it does give, as synonyms, "weaken, unfit, disqualify, incapacitate." The construction of the word taken by the court may be a legitimate one. The reasoning is somewhat different from that of the same court in *Continental Life Ins. Co. v. Malott*, 166 N. E. 115. There the policy insured against death or disability by accidental means and sustained by "the wrecking or disablement of any . . . motor-driven car, in which the insured is riding or driving or by being accidentally thrown from such vehicle or car." Insured drove into a gas station for the purpose of refilling his gas tank. The tank caught fire and insured was burned so that he died. The car itself was burned to some extent. The plaintiff contended that this was an explosion, *wrecking and disabling* the car, causing insured's death within the terms of the policy. The court in that case did not distinguish "wrecking" and "disabling." It did not construe the disjunctive "or." It said, "There was no explosion of the gasoline tank, and such an explosion did not wreck and disable the car," pointing out that the car was subsequently sold at a loss of only \$265.00. The case was apparently decided on the ground that the firing of the gasoline killed the insured, and not the wrecking or disabling of the automobile.

Although this perhaps distinguishes the cases on their facts, it would seem that the two opinions differ upon the construction to be given "disabled." Furthermore, in the *Continental* case, the court refused to apply the "favorable construction" rule, on the grounds that there was no ambiguity in these terms.

On this point, see: *Continental Ins. Co. v. Archibald*, 162 N. E. 66; *Continental Life Ins. Co. v. Wilson*, 137 S. E. 403 (Ga.).

III. In *American Ins. Co. v. Woolfolk*, — App. —, 169 N. E. 342, the policy contained a provision that it should be void if the interest of insured were not truly stated, or if the interest of insured were other than "unconditional and sole ownership." The company set up in its answer breaches of this condition. The reply alleged that the company had notice, through its agents, of each of the breaches set out in the answer, and that, with such notice and knowledge, appellant failed to cancel the policy and return or tender back to insured the premium theretofore paid by him to appellant. Appellant demurred. Upon this issue, the court said: "It is also well established law that when a policy contains a provision that it shall be void if the interest of the insured is not truly stated therein or if the interest

of the insured is other than unconditional and sole ownership, such provision means *voidable* at the option of the insurance company and that to render it void, upon discovery of the facts by which liability may be avoided, the company must act with reasonable promptness, must notify the insured of its election to avoid the policy, tender back or offer to restore the unearned premium received, and upon failure to do so it will be deemed to have waived the right to declare the policy void, and to have elected to treat it as a valid contract of insurance." The court cites: *Western Ins. Co. v. Ashby*, 53 App. 518; *National Mutual Ins. Co. v. Bales*, 81 App. 302. An examination of these cases shows that they support the contention for which they are cited. The rule stated seems to be a fair one, and is supported by the weight of authority. See: *Ohio Farmers Ins. Co. v. Vogel*, 166 Ind. 239, 244, 76 N. E. 977, 3 L. R. A. (N. S.) 966, 117 Am. St. 382, 9 Ann. Cas. 91. See also, in general, for construction of these clauses, *Notes*, 59 Am. Dec. 304, 4 L. R. A. 538.

IV. In *Hartford Live Stock Ins. Co. v. Everett*, — App. —, 169 N. E. 473, the appellees were owners of a race horse which appellants insured under a policy stipulating that the company should not be liable for the death of any animal "which shall have been subject to an operation of any kind during the life of this policy without the written consent of the company."

The horse was, without consent of the company, subjected to the treatment known as "firing." In this process perforations were made in the skin of one of the fore legs of the horse. This was done by a veterinary surgeon, using certain surgical instruments. The next day, preparatory to "firing" the other fore leg, the animal was led out of the barn into the barn lot, where he reared back and upward on his hind legs, stepped on a place which was covered with ice, and fell, striking his head on the ice, from which fall he thereafter died.

The court, relying upon *Hartford Live Stock Ins. Co. v. McMillen* (C. C. A., 1925), 9 F. (2d) 961, 962, held that the above clause included such an "operation" and that therefore the company was absolved from liability. In the Federal case cited the court construed the word "operation" neither its broadest sense, as "any act or series of acts by which some result is accomplished," nor in the narrow sense of a *major* surgical operation, but merely as any "surgical operation," construing the term in its "popular" sense.

It may be noted that in the *Hartford Live Stock Ins., Co.* case the animal died of septicaemia resulting from the treatment given. In the principal case the death might be said to have resulted from a fall which was not so closely connected with the "operation" which it is claimed was a breach of the promissory warranty. But the rule seems to be that a failure to comply with a warranty will bar recovery, whether or not the loss was caused by such failure. 32 C. J. 1294, Par. 521. See also, *National Live Stock Ins. Co. v. Owens*, 63 App. 70, 113 N. E. 1024. Furthermore, it must be admitted that in the principal case the loss would not have occurred had there been no breach of the warranty; also, that these provisions as to operations are probably inserted by the companies more for the purpose of securing the advantage of notice in advance of such operations, than to prevent the operations themselves. So the case seems to have been correctly decided.

C. W. W.